

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KAREN TREJO HOWARD,) Case No. CV 15-4641-JPR
)
 Plaintiff,)
) **MEMORANDUM DECISION AND ORDER**
 v.) **REVERSING COMMISSIONER**
)
CAROLYN W. COLVIN, Acting)
Commissioner of Social)
Security,)
)
 Defendant.)
)

I. PROCEEDINGS

Plaintiff seeks review of the Commissioner's final decision denying her application for supplemental security income benefits ("SSI"). The parties consented to the jurisdiction of the undersigned U.S. Magistrate Judge under 28 U.S.C. § 636(c). The matter is before the Court on the parties' Joint Stipulation, filed May 26, 2016, which the Court has taken under submission without oral argument. For the reasons stated below, the Commissioner's decision is reversed and this action is remanded for further proceedings.

1 **II. BACKGROUND**

2 Plaintiff was born in 1981 and moved to the United States
 3 from Honduras around 1990. (Administrative Record ("AR") 118,
 4 251.) She graduated high school in 2000 and worked part time as
 5 a nurse's assistant or caregiver from March 2009 until September
 6 2011. (AR 135-36.)

7 On November 18, 2011, Plaintiff applied for SSI, alleging
 8 that she had been unable to work full time since July 1, 2004,
 9 because of chronic cocci meningitis.¹ (AR 118, 135; see AR 29.)
 10 After her applications were denied initially and on
 11 reconsideration (AR 75, 80; see also AR 54, 65), she requested a
 12 hearing before an Administrative Law Judge (AR 85). A hearing
 13 was held on August 29, 2013, at which Plaintiff appeared without
 14 representation and testified through a Spanish-language
 15 interpreter. (AR 38-40, 42-43, 115-17.) No vocational expert
 16 appeared at the hearing (see AR 38-39); instead, the ALJ
 17 propounded posthearing interrogatories to a VE (AR 190), who
 18 responded (AR 209-15). The ALJ allowed Plaintiff the opportunity
 19 to object or propound cross-interrogatories (AR 199, 218), which
 20 she did not do. The ALJ issued an unfavorable decision on
 21 November 5, 2013, finding that Plaintiff was not disabled as of
 22 her filing date, November 18, 2011.² (AR 20, 27.) After

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24 ¹ Cocci meningitis is a form of "disseminated"
 25 coccidioidomycosis, in which a fungal infection becomes
 26 widespread throughout the body. See Edison v. United States, 822
 F.3d 510, 514 (9th Cir. 2016).

27 ² Because SSI payments may not be retroactively awarded,
 28 Plaintiff's effective onset date is her filing date. See SSR 83-
 (continued...)

1 retaining counsel, Plaintiff requested review from the Appeals
 2 Council (AR 15-16), which denied review on April 23, 2015 (AR 1).
 3 This action followed.

4 **III. STANDARD OF REVIEW**

5 Under 42 U.S.C. § 405(g), a district court may review the
 6 Commissioner's decision to deny benefits. The ALJ's findings and
 7 decision should be upheld if they are free of legal error and
 8 supported by substantial evidence based on the record as a whole.
 9 See id.; Richardson v. Perales, 402 U.S. 389, 401 (1971); Parra
 10 v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). Substantial
 11 evidence means such evidence as a reasonable person might accept
 12 as adequate to support a conclusion. Richardson, 402 U.S. at
 13 401; Lingenfelter v. Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007).
 14 It is more than a scintilla but less than a preponderance.
 15 Lingenfelter, 504 F.3d at 1035 (citing Robbins v. Soc. Sec.
 16 Admin., 466 F.3d 880, 882 (9th Cir. 2006)). To determine whether
 17 substantial evidence supports a finding, the reviewing court
 18 "must review the administrative record as a whole, weighing both
 19 the evidence that supports and the evidence that detracts from
 20 the Commissioner's conclusion." Reddick v. Chater, 157 F.3d 715,
 21 720 (9th Cir. 1998). "If the evidence can reasonably support
 22 either affirming or reversing," the reviewing court "may not
 23 substitute its judgment" for the Commissioner's. Id. at 720-21.

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² (...continued)

28 20, 1983 WL 31249, at *1 (1983).

1 **IV. THE EVALUATION OF DISABILITY**

2 Claimants are "disabled" for purposes of receiving Social
3 Security benefits if they are unable to engage in any substantial
4 gainful activity owing to a physical or mental impairment that is
5 expected to result in death or has lasted, or is expected to
6 last, for a continuous period of at least 12 months. 42 U.S.C.
7 § 423(d)(1)(A); Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir.
8 1992).

9 A. The Five-Step Evaluation Process

10 The ALJ follows a five-step sequential evaluation process to
11 assess whether a claimant is disabled. 20 C.F.R.
12 § 416.920(a)(4); Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir.
13 1995) (as amended Apr. 9, 1996). In the first step, the
14 Commissioner must determine whether the claimant is currently
15 engaged in substantial gainful activity; if so, the claimant is
16 not disabled and the claim must be denied. § 416.920(a)(4)(i).

17 If the claimant is not engaged in substantial gainful
18 activity, the second step requires the Commissioner to determine
19 whether the claimant has a "severe" impairment or combination of
20 impairments significantly limiting her ability to do basic work
21 activities; if not, the claimant is not disabled and her claim
22 must be denied. § 416.920(a)(4)(ii).

23 If the claimant has a "severe" impairment or combination of
24 impairments, the third step requires the Commissioner to
25 determine whether the impairment or combination of impairments
26 meets or equals an impairment in the Listing of Impairments
27 ("Listing") set forth at 20 C.F.R. part 404, subpart P, appendix
28 1; if so, disability is conclusively presumed.

1 § 416.920(a)(4)(iii).

2 If the claimant's impairment or combination of impairments
 3 does not meet or equal an impairment in the Listing, the fourth
 4 step requires the Commissioner to determine whether the claimant
 5 has sufficient residual functional capacity ("RFC")³ to perform
 6 her past work; if so, she is not disabled and the claim must be
 7 denied. § 416.920(a)(4)(iv). The claimant has the burden of
 8 proving she is unable to perform past relevant work. Drouin, 966
 9 F.2d at 1257. If the claimant meets that burden, a *prima facie*
 10 case of disability is established. Id.

11 The Commissioner then bears the burden of establishing that
 12 the claimant is not disabled because she can perform other
 13 substantial gainful work available in the national economy.
 14 § 416.920(a)(4)(v); Drouin, 966 F.2d at 1257. That determination
 15 comprises the fifth and final step in the sequential analysis.
 16 § 416.920(a)(4)(v); Lester, 81 F.3d at 828 n.5; Drouin, 966 F.2d
 17 at 1257.

18 B. The ALJ's Application of the Five-Step Process

19 At step one, the ALJ found that Plaintiff had not engaged in
 20 substantial gainful activity since November 18, 2011. (AR 29.)
 21 At step two, he found that Plaintiff had a severe impairment
 22 based on her conditions of "history of meningitis, status post
 23 ventricular peritoneal shunt" and "hydrocephalus."⁴ (Id.) The

24 ³ RFC is what a claimant can do despite existing exertional
 25 and nonexertional limitations. § 416.945; see Cooper v.
Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989).

27 ⁴ Hydrocephalus results from an excessive accumulation of
 28 cerebrospinal fluid ("CSF") in the brain, causing abnormal
 (continued...)

ALJ explained that Plaintiff contracted "meningitis in 2004, with subsequent complications of swelling in her head, after which she had to have a shunt placed in October 2011." (AR 30.) At step three, he determined that Plaintiff's impairments did not meet or equal a listing, noting in particular that her meningitis failed to satisfy Listing 14.07(A)(2) (in order to be presumptively disabling, meningitis infection must either be "resistant to treatment" or require "hospitalization or intravenous treatment three or more times in a 12-month period"). (AR 29-30.)

At step four, the ALJ found that Plaintiff had the RFC to perform a "reduced range of light work," with limitations as follows: (1) lifting and carrying up to 20 pounds occasionally and 10 pounds frequently; (2) standing and walking for up to six hours and sitting for eight hours in an eight-hour workday; (3) occasionally climbing, bending, kneeling, and stooping, but no crawling; (4) less than occasionally pushing, pulling, and reaching above shoulder level on left and right; and (5) no climbing of ladders, working at dangerous heights, operating dangerous machinery, driving a motor vehicle, or ambulating over uneven terrain. (AR 30-31.) The ALJ explained that he specifically reduced Plaintiff's capacity for "pushing, pulling,

⁴ (...continued)
widening of spaces in brain ventricles and potentially harmful pressure on brain tissues. Hydrocephalus Fact Sheet, Nat'l Inst. Neuro. Disorders & Stroke, http://www.ninds.nih.gov/disorders/hydrocephalus/detail_hydrocephalus.htm (last visited Sept. 15, 2016). "Hydrocephalus is most often treated by surgically inserting a shunt system. . . . [to] divert[] the flow of CSF." Id.

1 and reaching above the shoulder" based on objective evidence in
 2 the record. (AR 30.)

3 In determining Plaintiff's RFC, the ALJ relied "primarily"
 4 on a consulting examiner's February 2012 report assessing
 5 Plaintiff with "general limitations for light work," which was
 6 "consistent" with the agency medical consultants' RFC findings of
 7 "reduced range of light work."⁵ (Id.) The ALJ rejected
 8 Plaintiff's allegations of subjective symptoms as "not entirely
 9 credible" to the extent they conflicted with the RFC. (AR 31-
 10 32.)

11 Based on Plaintiff's RFC, the ALJ found that she could
 12 perform her past relevant work as a "Nurse's Assistant/Home
 13 Attendant," apparently combining the VE's descriptions of her
 14 past jobs as "Nurse's Assistant," DOT 355.674-014, 1991 WL
 15 672944, and "Home Attendant," DOT 354.377-014, 1991 WL 672933 -
 16 both of which, according to the VE, were "medium, semi-skilled
 17 work" in the DOT but specifically "performed in the light
 18 exertional range" by Plaintiff.⁶ (AR 32.) Again referencing the
 19 VE's findings, the ALJ explained that "an individual with
 20 [Plaintiff's] vocational profile and [RFC] could perform both of
 21 these jobs, as [she] performed them, but not as they are

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 25 ⁵ Those agency medical consultants actually found Plaintiff
 26 capable of performing a full range of light work. (See AR 62,
 27 72-73.)

28 ⁶ It is unclear whether the VE found Plaintiff's past job to
 resemble each of those two occupations or to be a "composite" of
 them with no counterpart in the DOT.

1 generally performed in the national economy."⁷ (AR 33.)
 2 Accordingly, the ALJ found her not disabled, ending the
 3 sequential evaluation process without reaching step five.

4 **V. DISCUSSION**

5 Plaintiff argues that the ALJ (1) failed his heightened duty
 6 to fully and fairly develop the record and safeguard her
 7 interests as an unrepresented claimant; (2) improperly discounted
 8 her subjective allegations as not fully credible; and (3) erred
 9 in finding her capable of performing her past relevant work as a
 10 nurse's assistant. (See J. Stip. at 2.)

11 Because the record was insufficient to support the ALJ's
 12 finding that Plaintiff could perform her past relevant work, the
 13 matter must be remanded for further analysis and findings. The
 14 Court therefore does not reach the other issues.

15 A. The ALJ's Finding that Plaintiff Could Perform Her Past
 16 Relevant Work Was Not Supported by Substantial Evidence

17 1. Relevant background

18 Plaintiff referenced her past job in two reports, an initial
 19 disability report dated November 21, 2011 (AR 134-40), and a
 20 work-history report dated January 18, 2012 (AR 144-55). She
 21 stated that from March 2009 to September 2011, she worked part
 22 time as a certified nurse's assistant or "caregiver in the
 23 private home," "tak[ing] care of senior." (AR 136, 144.) She
 24 worked six hours a day and four days a week for \$360 weekly. (AR

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 26 27 28 ⁷ The ALJ also explained that Plaintiff's past relevant work
 as a nurse's assistant/home attendant constituted substantial
 gainful activity because she had worked 24 hours a week and made
 \$360 each week. (AR 33.)

1 136, 145.) It was her "only one job in the last 15 years before
 2 [she] became unable to work." (AR 136.)

3 In the initial disability report, she listed the following
 4 daily functional demands of her past job, some of which were
 5 inconsistent with each other: no carrying or lifting, lifting up
 6 to 10 pounds frequently, standing for three hours, walking for
 7 one hour, sitting for one hour, a half hour of stooping, a half
 8 hour of kneeling, and two hours of reaching.⁸ (AR 136-37.) In
 9 the work-history report, she gave the daily functional breakdown
 10 as follows: lifting and carrying up to 10 to 15 pounds "when
 11 going to groceries," lifting up to 10 pounds frequently, standing
 12 for two hours, walking for one hour, sitting for two hours, "n/a"
 13 stooping and climbing, one hour of kneeling, a half hour of
 14 handling large objects, and a half hour of reaching. (AR 145.)

15 At the August 29, 2013 hearing, Plaintiff testified that she
 16 had worked as a CNA for "two years" before her shunt surgery and
 17 that her CNA license had recently expired. (AR 49.) The ALJ
 18 asked her to list any current physical or mental impairments that
 19 would prevent her from performing that work, to which Plaintiff
 20 responded,

21 Well, I get dizzy a lot and that's why I can't be sitting
 22 down or standing up for long periods of time. I took
 23 medication, [INAUDIBLE], and I get nauseous and dizzy
 24 with that and I've also gotten blotches on my skin and

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 26 _____
 27 ⁸ Although Plaintiff says she worked up to six hours a day,
 28 these time periods add up to eight hours. Some functions,
 however, are capable of being performed at the same time, perhaps
 explaining the discrepancy.

1 after the surgery, that's why I couldn't - I mean two
2 years for the surgery - I mean I haven't been able - I
3 get really dizzy. If I bend over -

4 (AR 50.) The ALJ asked whether she had "anything else" to add,
5 restating the same question. (Id.) She then added that she
6 suffered from blurred vision and headaches. (AR 51.) She
7 believed her conditions had "gotten worse" overall since
8 September 2011 in that she got "very nauseous at times" and her
9 dizziness "sometimes" kept her bedridden. (Id.) She stated that
10 she had to go see her doctor "every two weeks." (Id.)

11 The VE described Plaintiff's past relevant work as "nurse
12 assistant," DOT 355.674-014, and "home attendant," DOT
13 354.377.014 - both of which were medium, semiskilled work in the
14 DOT but light work "as performed by" Plaintiff. (AR 211
15 (referencing "Exh 4E," Plaintiff's work-history report).) The VE
16 found that a hypothetical individual with Plaintiff's RFC could
17 perform her past relevant work of "nurse assistant/home
18 attendant" as she actually performed it but not as it is
19 "performed generally" in the national economy or "according to
20 the DOT." (AR 212.)

21 In support of his testimony, the VE noted that he had
22 reviewed all relevant exhibits, but he "could not open media to
23 listen to [Plaintiff's] audio testimony," which kept him from
24 responding to hypotheticals assuming an individual "possess[ing]
25 the same capabilities and limitations as described by [Plaintiff]
26 in her testimony." (AR 210, 214.)

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1 2. Applicable law

2 At step four of the five-step disability analysis, a
3 claimant has the burden of proving that she cannot return to her
4 past relevant work, as either actually or generally performed in
5 the national economy. Pinto v. Massanari, 249 F.3d 840, 844 (9th
6 Cir. 2001); § 416.920(f). Although the burden of proof lies with
7 the claimant at step four, the ALJ still has a duty to make
8 factual findings to support his conclusion. Pinto, 249 F.3d at
9 844. In particular, the ALJ must make "specific findings of
10 fact" as to "the individual's RFC" and "the physical and mental
11 demands of the past job/occupation" and whether "the individual's
12 RFC would permit a return to his or her past job or occupation."
13 Ocequeda v. Colvin, 630 F. App'x 676, 677 (9th Cir. 2015) (citing
14 SSR 82-62, 1982 WL 31386, at *4 (1982)).

15 Although the claimant is the "primary source for vocational
16 documentation," the ALJ may use the VE to assist in the step-four
17 determination as to whether the claimant is able to perform her
18 past relevant work. Ocequeda, 630 F. App'x at 677; see
19 § 416.960(b)(2) (at step four, VE's testimony "may be helpful in
20 supplementing or evaluating the accuracy of the claimant's
21 description of his past work"). "Adequate documentation of past
22 work includes factual information about those work demands," and
23 "[d]etailed information about strength, endurance, manipulative
24 ability, mental demands and other job requirements must be
25 obtained . . . from the claimant, employer, or other informed
26 source." SSR 82-62, 1982 WL 31386, at *3.

27 Lastly, the ALJ can properly discharge his responsibility by
28 comparing the specific physical and mental demands of the

1 claimant's past relevant work with her actual RFC. Pinto, 249
 2 F.3d at 844-45; see SSR 82-62, 1982 WL 31386, at *2 (step four
 3 "requires careful consideration of the interaction of the
 4 limiting effects of the person's impairment(s) and the physical
 5 and mental demands of his or her [past relevant work] to
 6 determine whether the individual can still do that work").

7 3. Discussion

8 The ALJ's finding that Plaintiff was "capable of performing"
 9 her actual past work is not supported by substantial evidence.
 10 (AR 32.) The ALJ failed to make required factual findings
 11 regarding the specific demands of Plaintiff's past relevant work
 12 - in particular, the type and degree of "reaching"⁹ required, as
 13 further explained below - to "assure that the available facts
 14 support a conclusion regarding the claimant's ability or
 15 inability to perform the functional activities required in this
 16 work." See SSR 82-62, 1982 WL 31386, at *3; see also McLeod v.
 17 Astrue, 640 F.3d 881, 885 (9th Cir. 2010) (as amended May 19,
 18 2011) (ALJ's duty to fully and fairly develop record is
 19 heightened when claimant is not represented by counsel). Because
 20 the record remained relatively undeveloped as to Plaintiff's past
 21 relevant work and its specific functional demands and
 22 requirements, it was insufficient to support the ALJ's step-four
 23 findings.

24 Specifically, her past work required some unspecified type
 25 of reaching for up to two and a half hours each day (see AR 137,
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27 ⁹ Reaching involves "extending the hands and arms in any
 28 direction" and is an activity "required in almost all jobs." SSR
 85-15, 1985 WL 56857, at *7 (1985).

1 145),¹⁰ and yet the ALJ expressly limited Plaintiff to "less than
2 occasionally . . . reach[ing] above shoulder level on the left
3 and right" (AR 30). Nothing in the record described how much of
4 the reaching Plaintiff's past work required was above the
5 shoulder. Given that "occasionally" means occurring from very
6 little up to one-third of the time, see DOT 355.674-014, 1991 WL
7 672944, the ALJ said Plaintiff could reach above her shoulders
8 only less than occasionally, and Plaintiff reached for up to two
9 and a half hours in a full workday, the ALJ's finding that
10 Plaintiff could perform her past relevant work as performed is
11 not supported by the record. Thus, even assuming the ALJ's RFC
12 findings were fully supported by the record, insufficient
13 evidence showed that Plaintiff could perform her past work as she
14 performed it.

15 The ALJ's error was not harmless. Not only was Plaintiff
16 possibly unable to perform her actual past work, the ALJ
17 expressly found that she could not perform it as generally
18 performed. The ALJ did not reach step five, and Plaintiff's job
19 base is likely significantly eroded by the ALJ's reaching limits.
20 See SSR 85-15, 1985 WL 56857, at *7 (1985) (noting that because
21 "reaching" is "required in almost all jobs," "[s]ignificant
22 limitations of reaching . . . may eliminate a large number of
23 occupations a person could otherwise do"); Caster v. Colvin, No.
24 6:14-cv-01006-JE, 2016 WL 2940512, at *8 (D. Or. Apr. 27, 2016)

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28 ¹⁰ Because Plaintiff's past work was part time for six hours a day, her self-described requirement of up to two hours of reaching presumably would be about two and a half hours in a standard eight-hour workday.

1 (finding remand appropriate because ALJ "did not proceed beyond
 2 step four of the sequential evaluation process, thus making it
 3 impossible for this court to determine whether Plaintiff retained
 4 the capacity to perform other work"), accepted by 2016 WL 2905416
 5 (D. Or. May 18, 2016). Thus, the ALJ's error regarding
 6 Plaintiff's past relevant work was not harmless and warrants
 7 remand.

8 B. Remand for Further Proceedings Is Appropriate

9 When, as here, an ALJ errs, the Court generally has
 10 discretion to remand for further proceedings. See Harman v.
 11 Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000) (as amended). When
 12 no useful purpose would be served by further administrative
 13 proceedings, however, or when the record has been fully
 14 developed, it is appropriate under the "credit as true" rule to
 15 direct an immediate award of benefits. See id. at 1179 (noting
 16 that "the decision of whether to remand for further proceedings
 17 turns upon the likely utility of such proceedings"); Garrison v.
 18 Colvin, 759 F.3d 995, 1019-20 (9th Cir. 2014).

19 When the ALJ's findings are so "insufficient" that a court
 20 cannot determine whether the rejected testimony should be
 21 credited as true, the court has "some flexibility" in applying
 22 the credit-as-true rule. Connett v. Barnhart, 340 F.3d 871, 876
 23 (9th Cir. 2003); see also Garrison, 759 F.3d at 1020 (noting that
 24 Connett established that credit-as-true rule may not be
 25 dispositive in all cases).

26 Here, further administrative proceedings would serve the
 27 useful purpose of allowing the ALJ to develop the record as to
 28 whether Plaintiff can perform her past relevant work or any other

1 work. Thus, remand is appropriate. See Garrison, 759 F.3d at
 2 1020 n.26.

3 On remand, the ALJ should inquire in greater detail into the
 4 demands of Plaintiff's past relevant work and her capability to
 5 do it, including resolving the inconsistencies between
 6 Plaintiff's two reports of her job's functional requirements.
 7 (See, e.g., AR 136-37, 145.)¹¹ Because the VE was unable to hear
 8 and consider Plaintiff's testimony, the ALJ should conduct a new
 9 hearing at which both Plaintiff and a VE testify. Because the
 10 ALJ will necessarily reassess Plaintiff's credibility based at
 11 least in part on that testimony, the Court does not address
 12 whether the ALJ erred in finding Plaintiff only partially
 13 credible.¹²

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 19 ¹¹ The ALJ may further develop the record and address any
 20 additional unresolved factual discrepancies on remand. (Compare,
e.g., AR 47-48, 51 (Plaintiff's description of living only with
 21 aunt) with AR 290 ("claimant lives with her family"), 251 ("lives
 22 with her husband in NoHo, 3 dogs, no children"), 166 (Plaintiff's
 disability report listing her mother at same North Hollywood
 address).)

23
 24 ¹² But in fact, Plaintiff's meningitis appears to have been
 25 "well controlled" by medication (see AR 319 (Nov. 8, 2012
 26 clinical note, describing patient's history of cocci meningitis
 as "well controlled on Voriconazole"), and to the extent she
 27 remained compliant with medication, she "continue[d] to feel
 well," with no fevers, chills, stiff neck, headaches, night
 28 sweats, nausea, dizziness, or vomiting (AR 315; see, e.g., AR
 330, 323, 320, 315). Thus, Plaintiff's claims to the contrary
 were likely not fully credible.

1 VI. CONCLUSION

2 Consistent with the foregoing and under sentence four of 42
3 U.S.C. § 405(g),¹³ IT IS ORDERED that judgment be entered
4 REVERSING the decision of the Commissioner, GRANTING Plaintiff's
5 request for remand, and REMANDING this action for further
6 proceedings consistent with this Memorandum Decision. IT IS
7 FURTHER ORDERED that the Clerk serve copies of this Order and the
8 Judgment on counsel for both parties.

9

10 DATED: September 27, 2016


11 JEAN ROSENBLUTH
12 U.S. Magistrate Judge

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26 ¹³ That sentence provides: "The [district] court shall have
27 power to enter, upon the pleadings and transcript of the record,
28 a judgment affirming, modifying, or reversing the decision of the
Commissioner of Social Security, with or without remanding the
cause for a rehearing."